Supreme Court, U.S.
FILED

00-843 NOV 21 2000

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No.

In the Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

GULF POWER COMPANY, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Certain provisions of the Pole Attachments Act, 47 U.S.C. 224, direct the Federal Communications Commission to set "just and reasonable" rates, 47 U.S.C. 224(b)(1), that a utility may charge for "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility," 47 U.S.C. 224(a)(4) (1994 & Supp. IV 1998). The questions presented are:

1. Whether those provisions of the Pole Attachments Act apply to attachments by cable television systems that are simultaneously used to provide high-speed Internet access and conventional cable television programming.

2. Whether those provisions of the Pole Attachments Act apply to attachments by providers of wireless telecommunications services no less than to attachments by providers of wireline telecommunications services.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, the parties to the proceeding in the court of appeals were Alabama Power Company, Georgia Power Company, Southern Company Services, Tampa Electric Company, Potomac Electric Power Company, Virginia Electric & Power Company, Carolina Power & Light Company, Duquesne Light Company, Delmarva Power & Light Company, Public Service Electric & Gas Company, Houston Lighting & Power Company, Texas Utilities Electric Company, American Electric Power Service Corporation, Commonwealth Edison Company, Duke Energy Corporation, Union Electric Company, Florida Power and Light Company, the National Cable Television Association, MCI Telecommunications Corporation, U S WEST, Inc., Bell South Corporation, A T & T Corporation, SBC Communications, Inc., Pacific Bell, Nevada Bell, Southwestern Bell Telephone Company, GTE Service Corporation, Pennsylvania Cable & Telecommunications Association, Arizona Cable Telecommunications Association, and Ameritech Corporation.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States and the Federal Communications Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The decision of the court of appeals (App. 1a-41a) is reported at 208 F.3d 1263, and the order denying rehearing en banc (App. 42a-55a) is reported at 226 F.3d 1220. The principal order of the Federal Communications Commission (FCC), *Implementation of Section 703(e) of the Telecommunications Act of 1996: Amendment of the Commission's Rules and Policies Governing Pole Attachments*, is reported at 13 F.C.C.R. 6777 and is *reprinted at* App. 56a-204a.

JURISDICTION

The judgment of the court of appeals was entered on April 11, 2000. A petition for rehearing was denied on September 12, 2000 (App. 55a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The Pole Attachments Act, 47 U.S.C. 224 (1994 & Supp. IV 1998), is set forth at App. 205a-211a.

STATEMENT

1. Since the inception of cable television, cable operators have leased space on existing telephone or electric utility poles, or in underground utility conduits, for the attachment of cable distribution facilities, such as coaxial or fiber-optic cable and associated equipment. App. 5a; S. Rep. No. 580, 95th Cong., 1st Sess. 15 (1977). Constraints imposed by "zoning restrictions, environmental regulations, and start-up costs have rendered other options infeasible." App. 5a. The "monopoly" enjoyed by the power and telephone companies on poles and conduits "that could accommodate television cables has allowed them, in the past, to charge monopoly rents." *Ibid.* See generally *FCC* v. *Florida Power Corp.*, 480 U.S. 245 (1987).

To address that problem, Congress enacted the Pole Attachments Act, Pub. L. 95-234, § 6, 92 Stat. 35 (codified at 47 U.S.C. 224). Then as now, the Act required the FCC to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." 47 U.S.C. 224(b)(1). A "pole attachment" was defined as "any attachment by a cable television system to a pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C. 224(a)(4); see generally S. Rep. No.

580, *supra*. The FCC interpreted that provision to require it to ensure "just and reasonable" rates for all of a cable company's attachments, "regardless of the type of service provided over the equipment attached to the poles," and even if the attachments are used for "both traditional (*i.e.*, video) and nontraditional (*i.e.*, data) services on a 'commingled' basis." *Texas Utils. Elec. Co.* v. *FCC*, 997 F.2d 925, 927, 929 (D.C. Cir. 1993) (approving FCC interpretation).

2. The Pole Attachments Act was amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, which comprehensively revised the structure of regulation for the entire communications industry. Among the changes made by the Telecommunications Act were the following:

First, the 1996 amendments made the protections of the Pole Attachments Act available to certain entities beyond cable television operators. They accomplished that end by expanding the definition of the term "pole attachment" in Section 224 from "any attachment by a cable television system" to "any attachment by a cable television system *or provider of telecommunications service*." 47 U.S.C. 224(a)(4) (1994 & Supp. IV 1998) (emphasis added); see also 47 U.S.C. 224(f) (Supp. IV 1998) (generally requiring utilities to provide cable operators and "any telecommunications carrier" with "nondiscriminatory access"). Such "telecommunications service" is in turn defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. 153(46) (Supp. IV 1998).

Second, the 1996 amendments altered the specification of pole attachment rates that are applicable in particular contexts under the Act. Before 1996, Section

224(d) had set forth a particular formula for determining "just and reasonable" rates. In 1996, Congress provided that that formula "shall apply to the rate for any pole attachment used by a cable television system solely to provide cable service." 47 U.S.C. 224(d)(3) (Supp. IV 1998). Congress also provided that the Commission "shall * * * prescribe regulations in accordance with" a somewhat different formula "to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services." 47 U.S.C. 224(e)(1) (Supp. IV 1998).[1]

3. The FCC implemented the amendments to the Pole Attachments Act in *Implementation of Section 703(e) of the Telecommunications Act of 1996: Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 F.C.C.R. 6777 (1998), see App. 56a-204a. As pertinent here, the Commission determined that the protections of Section 224 continue to cover attachments used simultaneously for providing data services and traditional cable television service. *Id.* at 85a-89a. Such data services increasingly include "cable modem" service: the use of cable facilities—including the same wires over which conventional cable television signals are transmitted—to provide "broadband" (high-speed) Internet access to consumers. That technology "allows users to access the Internet at speeds fifty to several hundred times faster than those available through conventional computer modems con-

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[1] In an additional significant change, the 1996 amendments added a new Section 224(f). That provision does not address rates, but instead provides that "[a] utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it." 47 U.S.C. 224(f)(1) (Supp. IV 1998).

nected to what is commonly referenced in the telecommunications industry as 'plain old telephone service.'" *AT&T Corp.* v. *City of Portland*, 216 F.3d 871, 873-874 (9th Cir. 2000); see note 4, *infra*. The Commission based its conclusion that the Act governed attachments used simultaneously to provide cable television and Internet access on the ground that it "is still obligated under Section 224(b)(1) to ensure that the 'rates, terms and conditions [for pole attachments] are just and reasonable,' and, as Section 224(a)(4) states, a pole attachment includes 'any attachments by a cable television system.'" App. 90a. The Commission noted that that conclusion would remain valid regardless of whether a cable television system providing commingled Internet access is considered to be providing "cable service," "telecommunications service," or some other form of service. *Id.* at 89a-90a.[2] Finally, the Commission determined that the 1996 amendments extend the protections of Section 224 to wireless carriers no less than to other telecommunications carriers. *Id.* at 91a-96a.

4. A number of electric utility companies filed petitions for review of the FCC's order in the Third, Fourth, Sixth, Eighth, Eleventh, and D.C. Circuits. App. 14a-15a. Pursuant to the FCC's motion, the cases were consolidated in the Eleventh Circuit. *Id.* at 15a. In a ruling not at issue on this petition, a panel of the court of appeals unanimously held that challenges to various aspects of the FCC's orders under the Takings

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[2] Indeed, because the classification of cable Internet access as "cable service," "telecommunications service," or some other form of service is the subject of ongoing proceedings before the Commission concerning issues outside the Pole Attachments Act, the Commission expressly stated that it "d[id] not intend * * * to foreclose any aspect of the Commission's ongoing examination of those issues." App. 89a; see note 4, *infra*.

Clause were not ripe. *Id.* at 18a-19a. See also *id.* at 32a-35a (rejecting challenge to an additional portion of FCC Order). In the rulings that are at issue in this petition, however, the court of appeals panel divided. The majority reversed the FCC's conclusions that the Pole Attachments Act, as amended in 1996, authorizes it to regulate pole attachments by cable operators that supply Internet access as well as cable television service over their wires, *id.* at 26a-32a, and that the Commission has no less authority to regulate pole attachments to provide wireless telecommunications services than pole attachments to provide wireline telecommunications services, *id.* at 20a-26a.

a. The court of appeals rejected the FCC's conclusion "that Internet service provided by a cable television system * * * is subject to regulation under section 224(b)(1)'s mandate to 'ensure that the rates, terms, and conditions [for pole attachments] are just and reasonable.'" App. 26a. Although the court briefly adverted to the definition of "pole attachment" in Section 224(a)(4) of the pre-1996 Pole Attachments Act as "any attachment by a cable television system," see *id.* at 30a n.32, the court did not address the fact that that definition continues to define the pole attachments subject to the post-1996 Act. Instead, the court noted the separate provisions of the amended Act that "call[] for the Commission to establish two rates for pole attachments." *Id.* at 27a. One of those provisions "applies to 'any pole attachment used by a cable television system solely to provide cable service.'" *Ibid.* (quoting 47 U.S.C. 224(d)(3) (Supp. IV 1998)). The other "applies to 'charges for pole attachments used by telecommunications carriers to provide telecommunications services.'" *Ibid.* (quoting 47 U.S.C. 224(e)(1) (Supp. IV 1998)). In the court's view, "[f]or the FCC to

be able to regulate the rent for an attachment that provides Internet service then, Internet service must qualify as either a cable service or a telecommunications service." *Ibid.* Notwithstanding that the FCC had expressly declined to rule on the correct categorization of Internet access provided through cable modems, see note 1, *supra*, the court concluded that such Internet access is neither cable service, *id.* at 27a-31a, nor telecommunications service, *id.* at 31a, and that the FCC therefore has no authority to regulate rates for pole attachments by cable operators that carry both cable television and Internet access through the same wires. See *id.* at 31a-32a, 30a n.32.

b. With respect to wireless telecommunications service, the amended Pole Attachments Act, as noted above, provides that the FCC shall ensure "just and reasonable" "rates, terms, and conditions" for "pole attachments," 47 U.S.C. 224(b)(1), and it defines "pole attachment" to mean "any attachment by a cable television system *or provider of telecommunications service* to a pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C. 224(a)(4) (1994 & Supp. IV 1998) (emphasis added). Other subsections of the Act provide, *inter alia*, that the Commission "shall * * * prescribe regulations" based on specified cost-apportionment formulas "to govern the charges for pole attachments used by telecommunications carriers to provide telecommunications services," 47 U.S.C. 224(e)(1) (Supp. IV 1998), and that "[a] utility shall provide * * * any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or

right-of-way owned or controlled by it," 47 U.S.C. 224(f)(1) (Supp. IV 1998).[3]

The court of appeals rejected the FCC's position, see App. 91a-96a, that an attachment by a wireless telecommunications provider, no less than an attachment by a wireline provider, is an "attachment by a * * * provider of telecommunications services" within the meaning of the Act. The court stated:

> Section 224(a)(4) defines a pole attachment as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." A utility, according to section 224(a)(1) is "any person . . . who owns or controls poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications." Read in combination, these two provisions give the FCC authority to regulate attachments to poles used, at least in part, for *wire* communications, and by negative implication does not give the FCC authority over attachments to poles for *wireless* communications.

Id. at 21a-22a (footnotes omitted). In the court's view, "[t]he statutory language of section 224 itself prohibits the FCC from regulating pole attachments for wireless

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[3] For purposes of the Pole Attachments Act, as well as other provisions of Title 47, the term "'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing." 47 U.S.C. 153(43) (Supp. IV 1998). In turn, "'telecommunications carrier' means any provider of telecommunications services," 47 U.S.C. 153(44) (Supp. IV 1998), and the term "'telecommunications service' means the offering of telecommunications for a fee directly to the public * * *, regardless of the facilities used," 47 U.S.C. 153(46) (Supp. IV 1998).

communications; thus, we may end our review with that language." *Id.* at 22a n.25.

The court added that the "original purpose behind regulating utility poles" was "to prevent the telephone and power companies from charging monopoly rents to connect to their bottleneck facilities." App. 24a (footnote omitted). The court stated that the utilities' "poles are not bottleneck facilities for wireless systems," since their attachments could be placed "on any tall building," and wireless networks may "continue working if one antenna malfunctions." *Id.* at 25a. The court concluded that, because "utility poles are not bottleneck facilities for wireless systems," and "because the 1996 Act deals with wire and cable attachments to bottleneck facilities, the act does not provide the FCC with authority to regulate wireless carriers." *Ibid.*

c. Judge Carnes dissented. In his view "the statute unambiguously gives the FCC regulatory authority over wireless telecommunications service and Internet service." App. 41a.

With respect to cable television operators that provide Internet access through cable modems, Judge Carnes reasoned that the majority's conclusion that such Internet access "is neither a cable service nor a telecommunications service, and is thus not covered by the rate formulas described in section 224(d) for 'solely' cable services and in section 224(e) for telecommunications services * * * fails to address the section 224(b)(1) mandate that the FCC 'regulate the rates, terms, and conditions for pole attachments * * *.'" App. 39a. He explained that "[b]ecause pole attachment is defined as 'any attachment,' * * * section 224(b)(1) requires the FCC to ensure just and reasonable rates for all pole attachments, including those used to provide Internet service." *Id.* at 39a-40a.

With respect to wireless telecommunications services, Judge Carnes relied again on the fact that "pole attachment" is defined as "*any* attachment by a * * * provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." App. 37a. In his view, "[a]pplying that definition * * *, the FCC has the authority to regulate *all* attachments, i.e., attachments 'of whatever kind,' by a * * * provider of telecommunications service." *Id.* at 38a (citation omitted). Although the majority had relied on the statutory definition of "utility," Judge Carnes explained that that definition "serves merely to exempt from mandatory access any utility that does not make its poles available for wire communications at all." *Ibid.* But "once a utility makes its poles available, even 'in part,' for wire communications, it is subject to mandatory access for all pole attachments." *Ibid.* In sum, "[n]othing about the definition of utility negates the FCC's mandate to regulate rates for all pole attachments." *Id.* at 38a-39a.

5. The government and other parties sought rehearing en banc. The court of appeals denied that request in a short per curiam order. App. 44a. Judge Carnes filed a statement concerning the denial of rehearing en banc. He noted that his opinion dissenting in relevant part from the panel's result "explains why I think the panel majority erred in holding the Pole Attachments Act's regulated rate provisions do not extend to attachments used for wireless communications and Internet services." *Ibid.* With respect to rehearing en banc, however, he observed that "five of the twelve judges in active service on this Court are disqualified from participating in this important case." *Id.* at 46a. That fact, he explained, made it nearly automatic that the court would deny the government's rehearing en banc peti-

tion, because, under Eleventh Circuit precedent, the court could not grant such a petition without the support of a majority of "all active circuit judges serving on the court at the time of the poll including those judges who are disqualified from participating." *Id.* at 45a. As Judge Carnes explained, so long as the author of the panel majority opinion (the only other active Eleventh Circuit judge on the panel, since the third member of the panel was a Senior Circuit Judge from another court sitting by designation) stood by his original position, "this case could not be taken en banc no matter how strongly the remaining six non-disqualified judges thought it should be." *Id.* at 47a.

Judge Carnes noted that the inability to obtain en banc review in this case is "particularly unfortunate" "because this is an important case that may affect every person who uses wireless communication or Internet service in this country." App. 53a-54a. He noted that, as a result of the fact that the Eleventh Circuit's decision has binding nationwide significance, "the law on th[e]se industry-shaping issues of exceptional importance is decided not by a majority of the judges in active service on this Court but instead solely by one active judge of this Court joined by a senior judge from another court." *Id.* at 54a

REASONS FOR GRANTING THE PETITION

The court of appeals held that the rate protections of the Pole Attachments Act do not apply to cable television systems that provide Internet access in addition to cable television programming over their wires and that those protections do not apply in full (and, under one possible interpretation, may not apply at all) to providers of wireless telecommunications services. Those holdings are directly contrary to the terms of the Act,

which unambiguously provide that the FCC "shall regulate" the rates for "pole attachments," 47 U.S.C. 224(b)(1), and define "pole attachments" as "*any* attachment by a cable television system or provider of telecommunications service," 47 U.S.C. 224(a)(4) (1994 & Supp. IV 1998) (emphasis added). With respect to cable Internet access, the court of appeals' ruling—that cable television systems are excluded from the rate protections of the Act, and therefore penalized, as soon as they provide Internet access in addition to cable television service over their wires—directly contradicts Congress's intent to make affordable, state-of-the-art Internet access broadly available. With respect to providers of telecommunications services, the panel's decision disregards the broad language of the Pole Attachments Act, which does not admit of a distinction between providers of wireless and wireline telecommunications services in defining the class of protected entities.

The issues decided by the court of appeals were thus squarely addressed by Congress and resolved in the plain terms of the amended Pole Attachments Act. The court of appeals' substantial constriction of the Act, based on policy rationales that were rejected by Congress and that are inconsistent with Congress's objectives, is unjustified. Moreover, the court of appeals' decision will have nationwide significance, because that decision is binding on the Commission and there will likely be no further opportunity for any other court of appeals to consider the question. Further review is warranted to keep the Eleventh Circuit's decision from impairing the deployment of broadband Internet access to all Americans, and from unduly constricting the statutory protections Congress enacted to foster the growth of all varieties of communications services.

1. a. As the Commission's order under review explains, the Commission before 1996 had ruled "that the provision by a cable operator of both traditional cable services and nontraditional services on a commingled basis over a single network * * * justified only a single, regulated pole attachment charge by the utility pole owner." App. 82a-83a. That rule was upheld by the D.C. Circuit in *Texas Utilities Electric Co.* v. *FCC*, 997 F.2d 925 (1993). In the proceedings under review in this case, the Commission concluded that nothing in the 1996 amendments altered the conclusion that it had reached under the original Pole Attachments Act and that had been affirmed in *Texas Utilities*. Cable television service and Internet access are routed through the same pole attachments—indeed, through the same wires at the same time. See *BCI Telecom Holding, Inc.* v. *Jones Intercable, Inc.*, 3 F. Supp. 2d 1165, 1170-1172 (D. Colo. 1998). A cable television system does not forfeit its statutory protection by adding Internet signals.

That conclusion is compelled by the language of Section 224, whose relevant terms were not changed in 1996. Section 224(b) requires the Commission to ensure reasonable rates, terms, and conditions for "pole attachments," and Section 224(a)(4) in turn defines "pole attachment" to include "*any* attachment by a cable television system" (emphasis added). As the D.C. Circuit held in *Texas Utilities*, those provisions authorize the Commission to ensure reasonable rates for "any" attachment by a cable television system, "regardless of the type of service provided over the equipment attached to the poles." *Texas Utils.*, 997 F.2d at 927.

The court of appeals purported not to reject the D.C. Circuit's holding in *Texas Utilities*. See App. 30a n.32. Instead, the court attempted to distinguish the *Texas*

Utilities decision on the ground that Congress had intended to limit the Commission's authority in the 1996 legislation. Although Congress in 1996 had not amended the key language that unambiguously requires the Commission to regulate pole attachment rates for "any" cable system, the court sought to divine Congress's intent from other language that Congress added to prescribe the content of the Commission's pricing rules in two discrete situations: where attachments are used "by a cable television system solely to provide cable service," 47 U.S.C. 224(d)(3) (Supp. IV 1998), and where attachments are used "by telecommunications carriers to provide telecommunications services," 47 U.S.C. 224(e)(1) (Supp. IV 1998).

The former provision compels the Commission to grandfather cable systems used "solely to provide cable service" into the preexisting rate structure for attachments, and the two provisions together enable the Commission to level the competitive playing field by prescribing the somewhat higher attachment rates of Section 224(e) when cable operators provide conventional telecommunications services in competition with telecommunications carriers. See H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 206 (1996); S. Rep. No. 367, 103d Cong., 2d Sess. 65 (1994). The court of appeals erroneously interpreted those provisions, however, not just to address the content of the regulated rate in particular circumstances, but also to define the limits of the Commission's more general authority under Section 224(b)(1) to ensure "just and reasonable" pole attachment rates; in the court's view, if an attachment is used neither to provide "telecommunications service" nor "solely to provide cable service" for purposes of Sec-

tions 224(d) and 224(e), it falls entirely outside the scope of the Act's rate protections.[4]

That holding is incorrect. Even if (as the court of appeals believed) cable modem service should be characterized neither as a "cable service" nor as a

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[4] Because the court of appeals erroneously believed that a cable attachment receives statutory protection only if it is used to provide services falling within one of the two rate categories set forth in Section 224(d)(3) and Section 224(e)(1), it mistakenly felt compelled to address whether a cable company's provision of Internet access is properly characterized as a "cable service," a "telecommunications service," or an "information service." See App. 27a-29a. To date, the FCC has taken no position on that issue, which is central to a separate debate concerning whether a cable operator can be compelled to provide unaffiliated Internet service providers with "open access" to its cable facilities. See *id.* at 87a-89a; see also *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, FCC No. 00-355, ¶¶ 14-24 (Sept. 28, 2000) (*High-Speed Access Inquiry*) (seeking comment on proper statutory classification of high-speed Internet access using cable modem technology). Moreover, in its conclusion that Internet access provided through cable television wires "does not meet the definition of * * * a telecommunications service," App. 32a, the Eleventh Circuit's decision conflicts with a subsequent decision of the Ninth Circuit, which held that "to the extent that [a firm] provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act." *AT&T Corp.* v. *City of Portland*, 216 F.3d 871, 878 (2000); see also *ibid.* ("The Communications Act includes cable broadband transmission as one of the 'telecommunications services' a cable operator may provide over its cable system."); cf. *High-Speed Access Inquiry*, ¶¶ 13, 18-20 (seeking comment on whether it is appropriate to characterize cable modem service as "telecommunications service"). Ninth Circuit precedent therefore would compel a contrary result on the first question presented here, because, unlike the Eleventh Circuit, the Ninth Circuit would place cable Internet access within the scope of "telecommunications services" for purposes of Section 224.

"telecommunications service," the logical consequence of that position would still be to preserve the Commission's discretion to determine the content of its pricing regulation of the attachments used to provide that service. It would not be to eliminate all rate protection for attachments used simultaneously to provide both traditional video programming and cable modem service. Nothing in either Section 224(d) or Section 224(e) alters the straightforward language of Section 224(b)(1), which requires the FCC to ensure a "just and reasonable" rate for "any" attachment by "a cable television system."

That conclusion is not only required by the language of the Pole Attachments Act, but it is also the only conclusion that is consistent with Congress's purpose. To run their cable wires into customers' homes for any purpose, cable companies must have reasonable access to the utility poles, conduits, and other essential facilities at the center of this case. As even the majority on the court of appeals agreed, it was precisely to keep the costs of such access reasonable that Congress gave all "cable systems" the rate protections of Section 224(b). App. 5a-6a. The result of the panel's decision, however, is to strip cable companies of those protections if they use their wires, even in part, to offer their customers high-speed Internet access in addition to ordinary video programming. Significantly, the same Congress that enacted the 1996 amendments to Section 224(b) simultaneously directed the Commission to "encourage the deployment" of broadband capability to all Americans and, if necessary, to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment." See Pub. L. No. 104-104, Tit. VII, § 706(a), (b) and (c)(1), 110 Stat. 153

(47 U.S.C. 157 note).[5] It is highly implausible to conclude that, in the same legislation, Congress exposed cable operators—and, ultimately, consumers—to the full brunt of monopolistic rate practices once those operators try to recover the costs of the massive "infrastructure investments" needed to upgrade their cable facilities for the provision of broadband Internet access.[6] Yet that is the reading that the court of appeals has here adopted for the nation.

Finally, even if there were ambiguity in Section 224, "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999) (citing *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-843 (1984)). Here, the Commission's resolution of any ambiguity created by the various provisions of Section 224 was more than reasonable. It is entitled to judicial deference, particularly in light of the immense practical consequences at stake for the cable industry and for American consumers.

b. The question whether cable providers that provide commingled Internet access are entitled to the protection of the Pole Attachments Act is one of exceptional national significance warranting this Court's review. Because this case arose on direct Hobbs Act

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[5] See also 47 U.S.C. 230(b)(1) (Supp. IV 1998) ("It is the policy of the United States * * * to promote the continued development of the Internet and other interactive computer services and other interactive media.").

[6] Indeed, as utilities themselves increasingly enter the market for provision of Internet access, they have an incentive not only to charge monopolistic prices for pole attachments, but also to discriminate against their cable company competitors with respect to the terms and conditions of access to the bottleneck facilities at issue here.

review of FCC rules, see 28 U.S.C. 2342(1), it may present the only opportunity for any court to address the issues presented here. As a general matter, when challenges to FCC rules are consolidated for review in a single court of appeals, that court's affirmance or invalidation of those rules applies nationwide; once those rules are vacated, the FCC does not seek to enforce them in other circuits. See 28 U.S.C. 2349(a) ("The court of appeals in which the record on review is filed, on the filing, has * * * exclusive jurisdiction to make and enter * * * a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.").

Moreover, this case, which was decided by a split vote of a single three-judge panel and was also, for recusal reasons, effectively immune from any subsequent en banc review, see App. 42a-55a, resulted from actions filed by large utilities from all around the country that were consolidated for review by the Eleventh Circuit. This is therefore not a case in which this Court could benefit from awaiting further developments in the case law before granting certiorari. As Judge Carnes observed, "[a] more national case could hardly be imagined," and the outcome of this case "may affect every person who uses wireless communication or Internet service in this country." *Id.* at 54a.[7]

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[7] In response to the court of appeals' rejection of their Takings Clause challenge as unripe, see pp. 5-6, *supra*, some utilities have sharply raised their attachment rates in an effort to provide a concrete factual setting for disposition of that constitutional challenge. The rate levels the utilities have chosen vividly illustrate the dramatic consequences of removing statutory rate protections in this context. For example, one of the principal utilities involved in this case (Gulf Power) has now sought to raise its attachment rates from $6.20 to $38.06 per pole, and another (Alabama Power)

2. This Court should also grant certiorari to review the Eleventh Circuit's decision concerning the application of Section 224 to providers of wireless telecommunications services.

As explained above, the protections of the Pole Attachments Act apply to "any attachment by a * * * provider of telecommunications service." 47 U.S.C. 224(a)(4) (1994 & Supp. IV 1998). "Telecommunications service" is defined as the offering of telecommunications for a fee directly to the public "regardless of the facilities used." 47 U.S.C. 153(46) (Supp. IV 1998); see also 47 U.S.C. 153(43) (Supp. IV 1998) (defining "telecommunications"). Congress thus unambiguously applied the protections of Section 224 to "any attachment" by carriers that provide "telecommunications for a fee directly to the public * * * regardless of the facilities used." Congress could not have been clearer in extending the Section 224 protections to attachments used to provide wireless telecommunications services to the same extent as wireline telecommunications services.

The court of appeals excluded providers of wireless services from the full protections of Section 224 on the ground that the Pole Attachments Act elsewhere defines the "utilities" whose poles are subject to the obligations of that provision as companies that own

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has similarly sought to raise its attachment rates from $7.47 to $38.81 per pole. See *Florida Cable Telecomm. Ass'n* v. *Gulf Power Co.*, complaint pending, P.A. No. 00-004 (FCC Cable Servs. Bur. July 10, 2000); *Alabama Cable Telecomm. Ass'n* v. *Alabama Power Co.*, DA 00-2078 (FCC Cable Servs. Bur. Sept. 8, 2000). Alabama Power has filed a petition for review of the order issued by the FCC's Cable Services Bureau prohibiting its rate increase. See *Alabama Power Co.* v. *FCC*, No. 00-14763-I (11th Cir. filed Sept. 13, 2000).

certain facilities "used, in whole or in part, for any wire communications." 47 U.S.C. 224(a)(1) (1994 & Supp. IV 1998). As the dissent below observed, however, the statutory definition of who must *provide* pole attachments at regulated rates has no logical bearing on the separate question of who may *receive* pole attachments at regulated rates. See App. 38a-39a. And, even if the statute were ambiguous on this point, the FCC's resolution of the ambiguity would be entitled to substantial deference, which the court of appeals erroneously withheld.

The court of appeals separately reasoned that, as a policy matter, wireless carriers do not need the protections of Section 224, because (the panel believed) a utility's poles "are not bottleneck facilities for wireless systems." App. 25a. That reasoning is both legally unsound and factually mistaken.

As a legal matter, the plain language of Section 224(a)(4) is dispositive, regardless of whether it extends rate protections to a larger class of beneficiaries or attachments than the particular subclasses with which Congress was most acutely concerned. "[I]t is not, and cannot be, [judicial] practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy." *Brogan* v. *United States*, 522 U.S. 398, 403 (1998). In any event, regardless of whether the poles in question are "essential facilities" for wireless carriers in an antitrust sense, Congress and the FCC reasonably guaranteed those carriers just and reasonable rates for their attachments to promote the development of the wireless industry.

As a factual matter, the panel majority was wrong in suggesting that utility poles are not "bottleneck facilities for wireless systems." Wireless systems are typically wireless only between the subscriber's wire-

less telephone and the nearest receiving antenna. Wireless providers often depend on poles, ducts, conduits, and rights-of-way to get their signals from such antennas back to a central location, where they are connected to a network that may itself include pole-to-pole wireline facilities. See *Promotion of Competitive Networks in Local Telecommunications Markets*, 14 F.C.C.R. 12673, 12712, ¶ 71 (1999).

The court of appeals' decision might have rested on a misunderstanding of these industry realities, and perhaps the decision may reasonably be construed not to exclude a wireless carrier's wireline facilities from the scope of Section 224. More generally, however, Section 224 should simply be read according to its plain language, which extends to "any" attachment of any telecommunications carrier, including any and all attachments of wireless carriers. 47 U.S.C. 224(a)(4) (1994 & Supp. IV 1998). This Court's review is needed to correct the Eleventh Circuit's rejection of that important statutory mandate.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 2000